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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

MOTION OF PETITIONERS FOR LEAVE TO FILE THE ANNEXED PETITION FOR REHEARING OR MODIFICATION OF ORDER GRANTING PETITION FOR WRIT OF CERTIORARI.

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
208 S. La Salle Street,
Chicago 4, Illinois,
Counsel for Petitioners.

Dated: October 19, 1950.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

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GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

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MOTION OF PETITIONERS FOR LEAVE TO FILE THE ANNEXED PETITION FOR REHEARING OR MODIFICATION OF ORDER GRANTING PETITION FOR WRIT OF CERTIORARI.

Emich Motors Corporation and U. S. Acceptance Corporation, petitioners, respectfully move for leave to file the annexed petition for rehearing or modification of the order of this Court of October 9, 1950, granting the petition for certiorari but limiting the scope of review.

Rehearing or modification is sought for the purpose of inducing this Court to remove the limitations upon the scope of the review, for the reasons set forth in the annexed petition.

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
208 S. La Salle Street,
Chicago 4, Illinois,
Counsel for Petitioners.

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GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

PETITION FOR REHEARING OR MODIFICATION OF ORDER GRANTING PETITION FOR CERTIORARI.

Emich Motors Corporation and U. S. Acceptance Corporation, petitioners, pray that this Court grant rehearing or modification of its order of October 9, 1950, which provided as follows:

> "The petition for writ of certiorari is granted limited to the question whether the Court of Appeals erred in construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation."

Rehearing or modification is sought for the purpose of inducing this Court to remove the limitations imposed by said order upon the scope of the review.

Reasons For Granting Rehearing or Modification.

It would seem futile to construe Section 5 of the Clayton Act while at the same time leaving undisturbed the insurmountable hurdles wrongfully erected by the Court below in the path of virtually all private suitors in large conspiracy cases under the antitrust laws. No matter how broadly Section 5 of the Clayton Act may be construed, the benefits conferred thereby upon plaintiffs become puny when contrasted with the gigantic benefits conferred by the opinion below upon defendants without Congressional action. Of what material aid can Section 5 be to a victim when the conspirators, as here, are provided with an arsenal of weapons, including the right to establish a price-fixing purpose as a defense, to call 15,000 dealers to give negative testimony, to introduce huge masses of uncorroborative evidence, and to contrive a sham defense, dishonest, mass-produced and carried to ludicrous extremes? (Petn. for Cert., pp. 26-43.) These plus the creation of extreme handicaps in the proof of damages (Petn. for Cert., pp. 43-45) completely overshadow the benefits conferred by Section 5. Manifestly, therefore, if Section 5 has a public importance sufficient to command this Court's attention, necessarily the propriety of the countervailing benefits gratuitously bestowed upon defendants has no less public importance and also requires this Court's review. It would be incongruous to limit the review to Section 5 when the other matters, not reviewed, would rob Section 5 of all of its potency.

It goes without saying that a private suitor is not interested in continuing on with expensive and burdensome litigation when to do so could result in nothing more than a

pyrrhic victory—in which a point may be won but the case is lost. That kind of victory, so far as petitioners are concerned, is purely academic and virtually moot. Yet the effect of the limitations in this Court's order of October 9, 1950, is to place petitioners precisely in the position of continuing such a fruitless struggle. From their standpoint, the only possible outcome of the review, so limited, would be the affirmance of the order below of a new trial, even though they prevail on review. But the new trial will confront petitioners with intolerable burdens as hereinabove mentioned, which would not be in anywise ameliorated by this Court upon the limited review granted. This being so, it is wholly unrealistic to suppose that petitioners would engage in a new trial. Petitioners do not have the resources, physical or financial, to pursue such a program of futility.

Merely to retry the case under the rulings of the trial court, even without the vastly expanded evidentiary frontiers envisaged by the Court of Appeals, is unthinkable. The trial below, of unparalleled length, covered a period of more than four months, over three months being consumed by the defense. (R. 1602, 6970.) It was touch-and-go whether the trial would outlast the jury. The last alternate was sworn as a juror over 1½ months before the verdicts were returned. (R. 4366.) Respondents then refused to agree to carry on with less than twelve jurors, meanwhile continuing to spin out their defense in the hope of outlasting the jury. (R. 4404, 4478, 5059-5063.) These tactics drove the jury to the extra-ordinary extreme of beseeching the trial judge to bring the case to an end. (R. 6031.) The ordeal was so excruciating that two of plaintiffs' lawyers collapsed and dropped out of the trial. (R. 7190.) A question arose as to whether the trial judge's health was being impaired. (R. 4836.) Under these circumstances, petitioners cannot subject themselves to another such ordeal,

especially in view of the huge masses of additional defense evidence to which the Court of Appeals opened the door. (Petn. for Cert., pp. 30-33.)

Moreover, there is little likelihood that another such onerous trial would dispose of the case. The opinion below leaves the trial court without adequate guidance in many important respects (R. 9479, *et seq.*), creating the strong possibility of an appeal from the second trial and a third trial and appeal, thus clogging the courts, contrary to public policy.

The result is all the more to be deplored because in the process of considering the question of statutory construction to which it limited the review, this Court undoubtedly will become familiar with the full dimensions of the antecedent criminal case, including the background, circumstances, most of the issues, the basis of the principal rulings and, indeed, much of the same evidence involved in the instant case. Thus, it is an unnecessary denial of substantial justice in this case to exclude those issues from review, especially since, as shown by the petition for certiorari, each of them, in and of itself, possesses great public importance.

Conclusion.

The real question emerging from the record in the instant case is whether the federal judicial system is capable of affording substantial justice to victims of monopolistic power in large conspiracy cases—whether, indeed, it can cope with such cases at all. This by far is the question of greatest public importance presented by this case. The holdings below not included within the scope of the limited review are the ones which raise this question.

These holdings, in their total effect, make it possible for conspirators to protract jury trials beyond the practical limits during which a jury can be kept together. Of what

use is the right of private action granted by Congress if judicial processes allow defendants to frustrate the enforcement of the remedy through an interminable trial?

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing or modification of said order be granted, removing the limitations upon the scope of the review.

Respectfully submitted,

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing or modification is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

THOMAS DODD HEALY,
HAROLD STICKLER,
A. BRADLEY EBEN,
Counsel for Petitioners.